

The Amending Process

1789-1800

Congress OF THE United States

begun and held at the City of New York, on
Wednesday the fourth of March, one thousand seven hundred and eighty nine

INAE-183
CRB18#015142
391/131976

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misinterpretation and abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution: viz^t

ARTICLES in addition to, and amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

Article the first. After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

Article the second. No law, varying the compensation for the services of the Senators and Representatives, shall be passed during the term for which they shall have been elected, or until an election of Representatives shall have intervened.

Article the third. Congress shall make no law respecting an establishment of religion, or prohibiting the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article the fourth. A well regulated militia, being necessary to the security of a free State, the keeping and bearing arms, shall not be infringed.

Article the fifth. No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article the sixth. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the persons or things to be seized.

Article the seventh. No person shall be held to answer for a capital, or otherwise infamous crime, without a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.

Article the eighth. In criminal cases, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article the ninth. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.

Article the tenth. Congress shall not be required, nor exercised, to lay any capitation or direct tax, nor shall any criminal or unusual punishment be inflicted.

Article the eleventh. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article the twelfth. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Christopher G. Eckard

Independence National Historical Park

1989

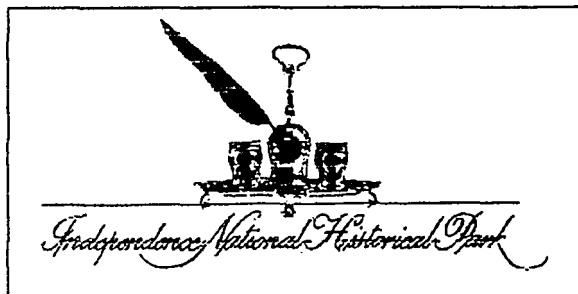
THE AMENDING PROCESS, 1789-1800

A Report Prepared for the Bicentennial
of the Bill of Rights and
Passage of the Eleventh Amendment

by

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Summer, 1989



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Prologue

Philadelphia's Constitutional Convention will always be remembered for the document conceived in the chambers of Independence Hall. Emerging with that Constitution, however, was the understanding that it was by no means a perfect document. Having witnessed the agonies wrought by the imperfect Articles of Confederation, the delegates came to Philadelphia in September, 1787, with a more adaptable system in mind, and left prepared to alter and amend the new Constitution if and when it proved defective. Under the Articles, amendments required a unanimous vote of the thirteen states, which made them virtually impossible to obtain--during the six-year life span of the Confederation, no amendments were appended. While it was clear that alterations needed to be more accessible under the new system, just how much more accessible was disputed. The method of amendment was also a matter of debate.

The Virginia Plan for the new constitution initially stated that "provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary," and that "the assent of the National Legislature ought not to be required thereto."¹ This provided the first grounds for discussion on June 5, 1787. Several delegates, notably South Carolina's Charles Pinckney, frowned upon this proposal, but Elbridge Gerry (Massachusetts) spoke in support of it:

The novelty & difficulty of the experience requires a periodical revision. The prospect of such a revision would also give intermediate stability to the Government.²

The resolution was temporarily postponed, but was revived on June 11, when George Mason (Virginia) tendered his support:

The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence. It would be improper to require the consent of the National Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment.³

Edmund Randolph, the Governor of Virginia, "enforced these arguments." While many other delegates agreed to the concept of amending the Constitution, none took a more uncompromising, hard-line stance than these two resolute Virginians, who proved to be quite an inflexible pair on the subject. Indeed, they ultimately comprised an impossible tandem to dissuade.

Though a resolution stating that "provision ought to be made for future amendments of the Articles of Union" was unanimously approved on July 23, the delegates struggled to find a suitable method for the process.⁴ Article XIX of the Committee of Detail's report, issued August 6, provided that two-thirds of the state legislatures be required to call a convention for amending the Constitution, and this article was subsequently approved on August 30.⁵ Detailed discussion on the topic was delayed, however, until September 10, when debate on the amendment clause began in earnest. Gerry moved for reconsideration of the article, on the grounds that a two-thirds majority might "bind the Union to innovations that may subvert the state constitutions altogether."⁶ Alexander Hamilton, though also favoring reconsideration, rejected Gerry's reasoning, stating: "There was no greater evil in subjecting the people of

the United States to the major voice than the people of a particular state."⁷ The proposed method of amendment was inadequate to Hamilton, however, and he predictably shifted the initiative over to the Federal government:

The state legislatures will not apply for alterations; but with a view to increase their own powers. The national legislature will be the first to perceive, and will be most sensible to, the necessity of amendments; and ought also to be empowered, whenever two-thirds of each branch should concur, to call a convention. There could be no danger in giving this power, as the people would finally decide in the case.⁸

Convinced by the given arguments, the delegates approved the motion to reconsider, and debate resumed. Following Hamilton's lead, Roger Sherman (Connecticut) proffered a clause allowing the national legislature to propose amendments for consideration by the states. James Wilson (Pennsylvania) promptly attached a requirement that a two-thirds majority of the states be necessary for approval of amendments. This motion narrowly lost out, but when Wilson suggested a three-fourths ratification requirement, it passed unanimously.⁹

Madison, having grasped the trend of the debate, then offered his version of the amendment article:

The legislature of the United States, whenever two-thirds of both houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the legislature of the United States.¹⁰

Hamilton quickly seconded this motion, but the proposal encountered immediate opposition from South Carolina delegate John Rutledge, who wanted a guarantee that slavery would not be altered or

abolished by amendment. A compromise protecting the relevant Constitutional articles until 1808 was reached, and the revised proposal passed.¹¹

Sherman was not satisfied, however. Under the proposed amendment process, the established rights of the small states, such as Connecticut, might be encroached upon by the larger ones:

three-fourths of the states might be brought to do things fatal to particular states; as abolishing them altogether, or depriving them of their equality in the Senate.¹²

He wanted the slavery-protection proviso extended, therefore, so as to ensure state equality in the Senate as well. Madison denounced the idea ("Begin with these special provisos, and every state will insist on them," he snapped), but though the large states were able to sidestep the motion momentarily, they eventually approved it to appease the small states.¹³

Dissension did not end here, however, and the Virginia delegation was again in the midst of the tempest. Venerable George Mason was back on the warpath, with Governor Randolph riding shotgun. Quoting Catherine Drinker Bowen's Miracle at Philadelphia,

It was the amending clause that brought Mason's dissatisfaction to a head. Article V provided that whenever two-thirds of Congress deemed it necessary, the Constitution could be amended after ratification by three-fourths of the states. Mason said such a method was "exceptionable and dangerous."¹⁴

Mason went on to state that, since the amending process depended on the initiative of Congress, "no amendments of the proper kind would ever be obtained by the people if the government should become oppressive, as he verily believed would be the case."¹⁵ In response, it was agreed upon that amendments could be proposed by,

in addition to Congress, two-thirds of the states. Unimpressed, Governor Randolph, the other half of the dynamic Virginia duo, followed this up by suggesting the foremost dread of the majority of delegates: a second convention. Stubbornly, he brought the dreaded demon out of the closet:

Randolph thereupon made a motion that amendments to the new Constitution might be offered by the state conventions, which in turn would be submitted to and finally decided on by another general convention.¹⁶

He concluded by stating that, if his proposal was disregarded, he would not sign the Constitution. Mason, citing the "dangerous power and structure of the government," sided with Randolph. Given the influence of these two men, this was a decisive moment in the Convention--would this attitude destroy the document painstakingly forged throughout the sweltering Philadelphia summer? Fortunately, the delegates were not swayed. A second convention, it was realized, would cause nothing but grief--the Virginians' bluff was called. Unwavering, the remaining delegates took the plunge, and, despite the missing signatures of Mason and Randolph, adopted the Constitution.

The first vital step had been taken, but the next great test would soon follow: the battle for ratification in the states. The final form of the Constitution's amendment clause, as ratified, is as follows:

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution; or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress; provided that no amendment which may be made prior to 1808 shall

in any matter affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

Thus the method of Constitutional revision was established, and the route leading to the first amendments--the Bill of Rights and the 11th Amendment--was opened. The supremacy of the national government had been proclaimed by the Constitution. The first eleven amendments would seek to keep that power in check.

PART I

Land of the Free: The Story of the Bill of Rights

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INTRODUCTION

On September 25, 1789, the U.S. Senate, concurring with the House of Representatives, adopted twelve proposed amendments to the Constitution. Submitted to the states for approval, all but two of these were ultimately ratified by the necessary three-fourths majority, and became our Bill of Rights.

This classic document was the culmination of a long struggle in Congress, led by James Madison of Virginia, which had its roots in the battle over ratification of the Constitution. Opponents of that document, signed only two years before in Philadelphia, had criticized the lack of a declaration of rights, expressing fears that such basic liberties as freedom of religion and speech could easily be violated. Federalist supporters of the Constitution answered that such guarantees were unnecessary when oppressive powers were not specifically granted by the Constitution.

To many Americans, however, this seemed an insufficient safeguard from tyranny, against which they had so recently rebelled. Debate in the state ratifying conventions reflected a strong desire for alterations, and specifically a bill of rights. The dissenting minority of Pennsylvania's ratifying convention became the first to propose a list of amendments, doing so in December, 1787, in Philadelphia. Several states, including influential Massachusetts and Virginia, further swelled the clamor for a Bill of Rights, adding recommendatory amendments to their ratifications. Though the Constitution was ultimately ratified, the voice of the people still echoed for changes, a voice the First Congress, meeting in New York in March, 1789, could not ignore.

Madison, the key figure in the amendment struggle, had been an early opponent of amending the Constitution, fearing changes might jeopardize ratification. Eventually, however, he came to recognize the value of certain amendments, which would, in his words, "serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty." Motivated by his close friend Thomas Jefferson and by what he discerned was the will of the people, Madison rapidly became a zealous advocate, and the father of our Bill of Rights.

Congress, however, did not share Madison's sense of urgency, and the Federalists continually stalled his efforts. He was finally able to maneuver his amendments through committee and bring them before the whole House, where debates were held over the inclusion of specific rights. Here, too, the format was altered, making the Bill of Rights a supplementary document and giving it the strength it carries today.

Seventeen amendments were ultimately approved and delivered to the Senate for concurrence. Efforts were again made to postpone their consideration, but eventually, after a bit of pruning, the Senate returned them to the House. A joint Congressional committee, guided by Madison, hammered out the final version, which was approved by the House on September 24, and by the Senate on September 25, 1789.

State ratification of the amendments was somewhat anticlimactic after the long struggle in Congress. Two minor amendments, not dealing with personal liberties, received little support, but the remaining ten--our Bill of Rights--became official with Virginia's ratification on December 15, 1791. This document

is the foundation of American freedom and liberty.

BEGINNINGS: SETTING THE TABLE

Several documents, ranging as far back as 1215, lay claim to the heritage of our Bill of Rights. While Magna Carta, that stalwart of 13th century British history, is the oldest and perhaps best known, a number of other charters had an undeniable influence in the formulation of our first ten constitutional amendments.

While modern students of history might overlook the more obscure influences, men such as James Madison were very familiar with the shifting course of human rights, particularly in American and English history, the two of which had only become separate with the Declaration of Independence in 1776. Thus, while certain documents might seem insignificant today, they play a significant role in this history, for they form an important link in the chain that leads to the Bill of Rights.

Three purely British documents begin this progression. The vanguard of these declarations, Magna Carta, is actually an exchange of written guarantees, extracted by force of arms from the King of England, for a reaffirmation of feudal ties by the English barons. This fact, however, does not preclude its significance; for the first time, basic human rights appear upon an English-written page, a shield against monarchical absolutism. Though feudal in nature, Magna Carta ultimately transcended those confines and extended its value to later generations of Englishmen, passing its legacy even across the Atlantic. Whether this was originally intended or not is moot; interpreted as it was, Magna Carta became the cornerstone of English rights for later centuries.¹⁷

The second key declaration followed four centuries later, sired by Sir Edward Coke, whose writings were well-known and revered years later by our Founding Fathers. Responding to abuses of liberty by Charles I, Parliament passed the "Petition of Right" in 1628, which concerned "divers rights and liberties of the subjects," and paved the way for the 1765 "Declaration of Rights and Grievances," the American colonies' response to the Stamp Act. Coke became an English champion of rights for his efforts against Stuart tyranny, and a venerated hero oft-cited by restless Americans years later.¹⁸

Third in the British lineage was the 1689 "Bill of Rights," written to accompany the ascension of William and Mary to the English throne at the conclusion of the Glorious Revolution. This document deals specifically with perversions of justice and prerogative by the Stuart kings, including the suspension of laws, excessive bail, and the quartering of royal troops, and provides the framework for many of the articles, as well as the name itself, of our Bill of Rights.¹⁹ Thus, exactly 100 years prior to its birth, the American document began to take shape.

Influential documents were not, of course, limited to the shores of the mother country. Colonial charters, granted by the king, were usually the first such texts to be cited by the colonists when their rights were infringed, and hold a significant place in the history of the Bill of Rights. English colonists possessed, in theory, all the privileges of their fellow countrymen, and their charters established these rights together with the tradition of representative assemblies. Thus, though thousands of miles across the ocean, the colonies maintained

themselves as blueprints of British government and society, expecting the liberty that Coke and his contemporaries had urged in the 17th century.²⁰ This, of course, was a misunderstanding that would prove difficult for the British to clear up, and which was ultimately punctuated by a musket shot heard 'round the world.

The path towards the Bill of Rights took an obvious course as the rift between England and her colonies continued to grow. Answering the tyranny they perceived in the Stamp Act of 1765, the colonies issued their "Declaration of Rights and Grievances," which, as mentioned above, was strongly influenced by the English "Petition of Right" of 1628. It asserted the colonists' rights as loyal Englishmen, and tagged the Stamp Act "unconstitutional," waving the always-recognizable banner of Lord Coke.²¹ To British eyes, the colonists, it seemed, wanted their cake and to eat it, too. Americans, however, never having sacrificed their rights before, saw no reason to do so now. While the ancestry is clearly British, the message has a distinctly American flavor. Basic human liberties remain unchanged, but political circumstances continue to shift over time.

The route to American independence is well-known, and the course to the Bill of Rights runs parallel. The Declaration of Independence, signed in Philadelphia in 1776, was founded on the premise of "unalienable rights" and their abuse by a tyrant, namely King George III, and the colonies-become-states rapidly made declarations of rights a part of their new constitutions to protect against such oppression. The Virginia Declaration of Rights, written, also in 1776, by George Mason, became the model for the new states, and later served as a standard for James Madison.

The strength of these declarations, combined with the central weakness of the Articles of Confederation, left the theme of personal rights unquestionably to the states, a status that went unchallenged throughout the Confederation period. With the advent of the new Constitution, however, and the power of the proposed federal government, liberty was seen, once again, at risk. At this stage, its ancestry firmly rooted, the Bill of Rights enters its own era.

THE U.S. CONSTITUTION

The Philadelphia Convention, 1787

Despite its significance and circumstance, the Philadelphia Convention passed with little mention of a declaration of rights. This was due, in part, to the existing Articles of Confederation, which, as noted above, left the subject of personal liberties strictly to the states. While crafting the new government, however, the delegates were influenced by several factors. Roger Sherman of Connecticut, for instance, cited three reasons why such a bill of rights was nonessential: first, the states' declarations were functioning and adequate; second, the power of Congress did not extend to the press; third, Congress could be trusted. Sherman was a Federalist, and, favoring an unaltered Constitution, his reasoning reflects that fact; still, his line of thinking is not unique, as the majority of delegates felt a bill of rights was, for the most part, unnecessary.²² If the Constitution did not, in fact, render these dangerous powers, why imply their existence with a bill of rights? This subsequently became a central Federalist argument.

The subject of rights was finally breached, late in the convention, when George Mason (Virginia) and Elbridge Gerry (Massachusetts) moved to include a bill of rights in the new Constitution, but this measure was quickly dismissed. James Madison, ultimately this drama's main character, attributed the rejection to the haste and fatigue of worn-out men, but the swiftness of the rejection still reflects an unfavorable overall mood. Born in the spirit of 1776 and dealing largely with

individual freedoms, the state constitutions carried considerable force in the minds of the delegates, while the concept of a strong American government, one which entered the realm of personal liberty, was still rather foreign. Indeed, Mason envisioned a fairly limited scope for his declaration, stating that "a general principle laid down. . . would be sufficient."²³ This is hardly the basis for a ringing affirmation of human rights, and demonstrates little urgency. Irving Brant, in The Bill of Rights: Its Origin and Meaning, notes that such a spineless declaration "Congress could heed if it felt like doing so, or trample underfoot without the least probability of being restrained by the judges." While, perhaps, "a noble expression of the principles of free government," it would have done little but inhibit the development of a true, meaningful bill of rights. In this respect, it is fortunate that Mason's efforts did fail.²⁴

It appears that any aspirations for a bill of rights were quite limited within the context of the Philadelphia Convention. Whether unmoved by the necessity of such a declaration or merely fatigued, the delegates relegated the question to another time and place. That place was the state ratifying conventions, and the time came quickly, as the Antifederalists began their unrelenting battle against the Constitution.

The Fight for Ratification

While the Constitution's opponents assailed it on several fronts, the lack of a bill of rights proved to be the Antifederalists' trump card and their main line of attack. The front lines of the ratification struggle were, of course, in the

state conventions themselves, but the war of words, written throughout the period on a national scale, was of vast importance as well. Verbal sparring proved continuous and heated, as the writers of both sides, many very talented, advanced their arguments and attacked those of the opponent. Reading their work reveals a dominant factor: each side had a firm belief in their respective cause, and the passion in their arguments went beyond mere political rhetoric. To many Antifederalists, the Constitution, revered though it is today as a bastion of freedom, conjured up memories of the British and George III, and represented a severe threat to their rights; one should recognize this before judging their efforts too harshly. Though their defeat ultimately proved beneficial, most were fighting for the just cause of liberty, and their contentions planted the seeds for the Bill of Rights. The Federalists, on the other hand, were unflinching in their devotion to the proposed federal government, refusing to waver despite the hard-pressing Antifederalists and persevering until victory was assured. Generally, each group, regardless of the final outcome, did the new nation proud.

Arguments: Pro and Con

With these thoughts in mind, we move to the discussion of the Constitution by its proponents and opponents. The declaration of rights theme, while crucial to the Antifederalists, often merely divided men between the two camps. Thomas Jefferson, representing the United States in France (but keeping a close watch on events across the Atlantic through his correspondence, especially with his friend and fellow Virginian, James Madison), generally favored the

new document. He was concerned about basic rights, however, as this excerpt from a December 20, 1787, letter to Madison reveals:

Let me add that a bill of rights is what the people are entitled to against every government on earth, general and particular, & what no just government should refuse, or rest on inference.²⁵

John Adams, also on foreign soil, wrote Jefferson from London in November, 1787, that perhaps a bill of rights should precede any new constitution.²⁶ This seems a bit odd coming from a High Federalist, but Adams is by no means alone in this respect. Many federal men, including George Washington, recognized that a declaration of rights might be required, at the very least to ease the minds of the opposition. Others, however, were unwilling to tamper with the Constitution or risk jeopardizing its ratification.

Pennsylvania's James Wilson, a leading Federalist, dominates this latter category. Perhaps the most zealous opponent of adding a bill of rights to the Constitution, Wilson is a virtual wellspring of commentary, with the Pennsylvania Ratifying Convention, held in Philadelphia in November, 1787, as his main audience:

If the powers of the people rest on the same establishment as is expressed in this Constitution, a bill of rights is by no means a necessary measure. . . in a government consisting of enumerated powers, such as is proposed by the United States, a bill of rights would not only be unnecessary, but, in my humble judgement, highly imprudent.²⁷

The latter remark, expressing fear that a listing of rights would only be a hindrance to liberty, is a theme continually hammered home by the Federalists. Wilson, writing in October, 1787, also put it as follows:

. . . it would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not

divested either by the intention²⁸ or the act that has brought that body into existence.

By listing protected rights, it would be implied that the Constitution imparted powers that infringed on those rights. This, the Federalists argued, was untrue, and would give the document a dangerous connotation. Therefore, under the shadowy pretext of reverse implication, a bill of rights would do more harm than good--admittedly a tough point to sell.

This argument certainly did not convince the Antifederalists. An unidentified author in Massachusetts, writing in 1788 under the pseudonym "Brutus," stated that

all the powers which the bills of rights guard against the abuse of, are contained or implied in the general ones granted by this Constitution. . . ought not a government, vested with such extensive and indefinite authority, to have been restricted by a declaration of rights? It certainly ought.²⁹

Thus, even before its ratification, interpreting the powers granted by the Constitution became a central issue.

The Federalists asserted that state constitutions, mentioned above, already protected personal rights, but this, too, was countered by the Antifederalists, who were quick to point out the nature of sovereignty in the proposed government. An example is this passage from a pamphlet written by George Mason in late 1787:

There is no declaration of rights: and the laws of the general government being paramount to the laws and constitutions of the several states, the declaration of rights, in the separate states, are no security.³⁰

This seems a logical argument, and the Federalists' reasoning here is rather suspect, since they would be the first to profess the supremacy of the federal government over the states.

Federalist James Iredell (North Carolina), in a published response to Mason, could only resort to an old, familiar argument:

As to the want of a declaration of rights. . .in regard to the new Constitution here: the future government which may be formed under that authority certainly cannot act beyond the warrant of that authority.³¹

Thus, limited by the nature of the contest--after all, little could be said against a bill of rights, particularly in a nation so recently freed from a tyrannical government--the Federalists had to fall back on the integrity of the Constitution (and, later, on the promise of subsequent amendments, discussed below), and hope that the nation's satisfaction with that document and desire for a successful union would carry them through ratification, despite a deficiency with regard to personal liberties.

Fearing that any vacillation concerning rights might ultimately prove a ruinous error, the Antifederalists fought hard against this strategy. The following quote from Richard Henry Lee (Virginia) exemplifies their approach:

There are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertained and fixed--a free and enlightened people, in forming this compact, will not resign all their rights to those who govern, and they will fix limits to their legislators and rulers, which will soon be plainly seen by those who are governed, as well as those who govern; and the latter will know they cannot be passed unperceived by the former, and without giving a general alarm. These rights should be made the basis of every constitution. . .³²

Elbridge Gerry, the chief Massachusetts Antifederalist, expresses the same fears in a pamphlet written in early 1788, linking any sacrifice of rights in the present to eventual, total oppression:

Despotism usually while it is gaining ground, will suffer men to think, say, or write what they please; but when once established, if it is thought necessary to subvert the purposes of arbitrary power, the most unjust restrictions may take place in the first instance, and

an imprimator of the Press in the next, may silence the complaints, and forbid the most decent remonstrances of an injured and oppressed people.³³

These quotations demonstrate the relative strength of the two positions. Safe in the knowledge that theirs was the purer conviction, the Antifederalists had any number of approaches to take in support of a declaration of rights, while the Federalists were constantly on the defensive, seeking out arguments against something they knew was a positive good, but which still jeopardized their purpose, ratification of the Constitution. Surprisingly, the Federalists were able to carry the initial battle, though compromise was the only way to assure victory in several states.

The State Conventions

Ratification of the Constitution encountered a varied level of opposition in the state conventions, from quick and unanimous approval to stubborn and heated debate over several weeks. While certainly important in Constitutional history, the states which ratified quickly are less significant for our purposes, since there was little discussion of amendments or a bill of rights in those conventions. As such, they will be mentioned only briefly, while debate in the key states will be emphasized.

Delaware became the first state to ratify, doing so unanimously on December 7, 1787. Pennsylvania followed closely, ratifying on December 12, but here the issue was much more in question, despite a significant Federalist majority at the convention. That group, led by the indomitable James Wilson,

staunchly opposed any amendments to the Constitution, and shot down every effort by the minority to propose them. Ratification passed by the relatively safe margin of 46-23. Frustrated, the Antifederalists, led by Robert Whitehill and John Smilie, issued their "Address and Reasons for Dissent," which eventually made its way around the country and broke the ground for state opposition and the proposing of amendments.³⁴ Rights are a fundamental part of the dissenting address:

The first consideration that this review suggests, is the omission of a bill of rights ascertaining and fundamentally establishing those unalienable and personal rights of men, without the full, free and secure enjoyment of which there can be no liberty; and over which it is not necessary for good government to have the control³⁵

While only a shout of protest from a defeated group, this address still paved the way for future efforts in other state conventions, with the promise of much more success.

Three states ratified next in rapid succession, New Jersey (unanimously on December 18, 1787), Georgia (unanimously on December 31, 1787, perhaps seeking Federal assistance in a brewing war with the Creek Indians), and Connecticut (on January 9, 1788, by a vote of 128-40), before the Constitution encountered its first key roadblock at the Massachusetts Convention, where the lines of opposition were closely drawn and the battle would be hard-fought. Massachusetts, the early focus in the American Revolution, also proved a critical state with regard to the Bill of Rights:

The Massachusetts ratification was, in many ways, the key action in the post-Philadelphia Convention movement to secure a federal Bill of Rights. Massachusetts was the first state to propose ratifactory amendments, which were transmitted to Congress together with the state's ratification (thus adopting the method proposed by the Pennsylvania minority, but turned down by that state's Convention majority). . . what is particularly noteworthy

about the Massachusetts ratifactory amendments is that they were drafted by the Federalist leaders. . .Without some concession to the widespread feeling that a Bill of Rights was necessary, the Massachusetts ratification itself might [have been] in danger.³⁶

Thus compromise became a necessary prerequisite to approval of the Constitution, at least in Massachusetts. Though this concession failed to impress some of the hard-line Antifederalists, the acceptance of the proposed amendments marked the debate's effective end in the Massachusetts Convention. The revisions were not required for that state's ratification, but they "placed almost irresistible pressure on the first Congress elected under the Constitution to initiate the amending process."³⁷ The proposed articles themselves are relatively insignificant, "a mild version of a Bill of Rights," but an important trend had been set, for

the other states which followed Massachusetts' example were far bolder in protecting individual rights and, between them, included all the rights later guaranteed in the Federal Bill of Rights.³⁸

Massachusetts ratified on February 6, 1788, by the still-narrow margin of 187-168; ten swing votes would have meant victory for the Antifederalists.

Though also dominated by a large Federalist majority (which ratified the Constitution, 63-11, on April 26, 1788), Maryland represented another step on the road to a federal bill of rights. The minority, guided by Luther Martin, proposed numerous amendments, several of which were the first state-recommended attempts to guarantee particular rights, including religious freedom, redress of grievances, trial by jury, protection from double jeopardy, and safeguards against the quartering of troops.³⁹ As reflected by this list of articles, Martin clearly recognized

the inherent threat to individual rights, and he reiterated this in an open letter to "the citizens of Maryland:"

With respect to a bill of rights, had the government been formed upon principles truly federal. . .legislating over and acting upon the states only in their collective or political capacity, and not on individuals, there would have been no need of a bill of rights. . .But the proposed constitution being intended and empowered to act not only on states, but also immediately on individuals; it renders a recognition and a stipulation in favour of the rights both of states and of men, not only proper, but in my opinion absolutely necessary.⁴⁰

Maryland's proposed amendments, though not officially recognized, influenced Virginia's pivotal convention, and seven of the suggested articles have corresponding ones in our Bill of Rights.

South Carolina, yet another state where ratification advocates held a solid majority, provided further impetus towards recommendatory amendments, including one that the states retain powers not delegated to the federal government, eventually the Tenth Amendment to the Constitution. Amending efforts, smothered by the Federalists whenever possible, prompted strong words from Antifederalists like James Lincoln: "Why was not the Constitution ushered in with the bill of rights? Are the people to have no rights?"⁴¹ Despite this opposition, however, the Federalists carried the day, and South Carolina became the eighth state to ratify, doing so on May 23, 1788, by a 149-73 vote. One further state ratification was needed to bring the new government into being.⁴²

New Hampshire became that state on June 21, 1788, ratifying by the narrow margin of 57-47. Again, amendments were recommended with ratification, though this time the Antifederalists nearly succeeded in making them a condition for approval instead of

subsequent to it. Notable articles included a ban on troop quartering and a standing army (the first such official proposals by a convention), an amendment preventing "laws touching religion" (first prohibitory language), and a guarantee of the right to bear arms, also for the first time in the states.⁴³

Despite the acceptance of nine states, the new Constitution meant little without the approval of Virginia and New York. The fight for ratification reached its climax in the Old Dominion, and only after long hours of extended debate did the Federalists win a narrow victory. Blessed with many of the young nation's top political leaders and closely divided between Federalists and Antifederalists, Virginia's final response was pivotal to the fate of the Constitution. Debate in the Virginia convention was stirring, fueled by Patrick Henry's oratorical ability and the argumentative genius of James Madison. The latter, a superior politician, led the faction favoring ratification, which also included the young John Marshall and, significantly, Governor Edmund Randolph, who had previously been counted with the opposition. Randolph's defection was a serious blow to the Antifederalist cause, but, though he had not signed it in Philadelphia, he was thoroughly convinced that the Constitution was now necessary for the young nation:

If in this situation we reject the Constitution the Union will be dissolved, the dogs of war will break loose, and anarchy and discord will complete the ruin of this country.⁴⁴

Henry, passionate and eloquent, headed the opposing camp, and respected Virginians George Mason and Richard Henry Lee lent further credibility to the Antifederalists. Their focus was, as

expected, the absence of a bill of rights in the proposed Constitution. A notable shift in the Federalist response took place, however: admitting the need for alterations, Madison's faction pressed for any amendments to be subsequent to ratification, in lieu of being a prerequisite for approval. Previous amendments, it was contended, were "pregnant with dreadful dangers."⁴⁵ This, naturally, opened the floodgates of opposition from Patrick Henry and his cohorts, who fervently warned against giving uninhibited power to a government with the false assurance that they will correct and amend a tainted document. Individual rights, Henry insisted, had to be guaranteed prior to approval, before the seeds of tyranny could be planted, or those in power might see it fit to deny them:

I can never. . .consent to hazard our most unalienable rights on an absolute uncertainty. ⁴⁶ .let us not adopt this system till we see them secure

The Federalists countered that there was no need to endanger the Union with prior amendments, when those same amendments could be obtained when union was secured--Henry was, in their eyes, exaggerating the threat to liberty through his powers of persuasion.

The debate continued, with certain delegates even dropping the names of Thomas Jefferson and George Washington to add weight to their arguments. It was clear that ratification would be a very close call. When the measure was finally put to a vote, Madison's Federalists narrowly defeated Henry's motion for prior amendments, and then ratified the Constitution, 89-79, on June 25, 1788.

On the following day, a committee (including Madison, Henry, Marshall, Mason, and George Wythe) was formed for the drafting of

subsequent, recommendatory amendments. The draft which evolved from this committee was very important, as it was the first state proposal for a full bill of rights and, of course, carried the prestige of Virginia with it. All but one of the proposed articles ended up in the federal Bill of Rights.⁴⁷

The summary of the Virginia Convention in The Roots of the Bill of Rights (volume 4) is insightful:

We can best estimate the importance of the Virginia-proposed Bill of Rights and amendments by comparing them with the sketchy proposals recommended by Massachusetts, South Carolina, and New Hampshire. In place of the rudimentary protections suggested by the other states, Virginia recommended a complete Bill of Rights--and one which covered all the essential guarantees later included in the federal Bill of Rights, except for the right to a grand jury indictment. . . .⁴⁸

Clearly, Virginia's ratification was not the only influential action taken at the convention; Congress, during its first session, could not ignore the plea for amendments headed by so important a state.

Another crucial state for ratification, New York was also closely divided on the amendment issue. The Federalists, led by Alexander Hamilton and John Jay, were compelled, as in Virginia, to concede the need for amendments, and once again the battle shifted to their nature and the timing of the process. Ratification very nearly became conditional on prior amendments, with Governor George Clinton and Melancton Smith almost guiding the Antifederalists to their goal, though, once again, the Federalists emerged victorious after an extremely close vote, 30-27, on July 26, 1788. Two new articles were added to previously suggested measures, including a "due process" phrase and protection against double jeopardy.⁴⁹

Though New York's recommendations added further pressure to the First Congress with regard to amending the Constitution, the Federalists had won another crucial, albeit narrow, victory, and only two relatively minor states, North Carolina and Rhode Island, remained outside the Union.

Despite the majority who had already ratified and the strong influence of neighboring Virginia, North Carolina's zealous Antifederalist contingent refused to budge on the issue of prior amendments, and the convention failed to ratify the Constitution in its first session. The Federalists, led by James Iredell, once again admitted the need for subsequent alterations, but still could not amass the needed votes. North Carolina, therefore, submitted a list of articles, identical to those proposed by Virginia, which it required prior to its acceptance of the Constitution.

While North Carolina's absence could not, and did not, prevent the new government from functioning, it did swell the growing current towards a bill of rights. Together with the weighty recommendations of Massachusetts, Virginia, and New York, the fact that two of the original thirteen colonies remained outside the Union (Rhode Island also refused to ratify) increased the pressure in Congress, and provided further grounds for the alterations proposed by James Madison in the House of Representatives.

Over a year later, North Carolina ratified the Constitution on November 21, 1789, by a vote of 194-77, with the Bill of Rights already submitted to the states for approval.⁵⁰

The stubborn state of Rhode Island refused even to call a ratifying convention until 1790, which, as noted above, further prodded Congress to amend the Constitution. While it did not

recommend any amendments, the state, through its stubbornness, had an indirect effect on the movement towards a bill of rights. "Diminutive Rhode Island" carried little political weight, but its absence was still noted with annoyance, and even Thomas Jefferson mentioned the need to draw the tiny state into the Union.

Eventually convinced it was in her best interest to do so and tempered somewhat by the emerging Bill of Rights, the black sheep entered the fold on May 29, 1790, ratifying by a narrow, 34-32 margin.⁵¹

With the necessary majority, the ratifying conventions had sanctioned the Constitution, and set the new government into motion. Giving its stamp of approval to the document crafted in Philadelphia, the nation had navigated a crucial crossroads in its history. Acceptance had not been unanimous, however, and resistance certainly did not end with ratification. New York Governor Henry Clinton and the Constitution's definitive nemesis, Patrick Henry, made a diligent effort for a second national convention, under the auspices of discussing necessary alterations, but undoubtedly retaining the ultimate Antifederalist goal of killing the document.⁵² Much of this endeavor was rooted, naturally, in Henry's home state, and included the following "Message from the Virginia Legislature" of November 14, 1788:

The cause of amendments we consider as a common cause; and, since concessions have been made from political motives, which, we conceive, may endanger the Republic, we trust that a commendable zeal will be shown for obtaining those provisions, which experience has taught us are necessary to secure from danger the unalienable rights of human nature.

The anxiety with which our countrymen press for the accomplishment of this important end, will all admit of delay. The slow forms of Congressional discussion and recommendation, if, indeed, they should ever agree to any change, would, we fear, be less certain of success.

Happily for their wishes, the Constitution hath presented an alternative, by admitting the submission to a convention of the States. To this, therefore, we resort as the source from whence they are to derive relief from their present apprehensions.

We do, therefore, in behalf of our constituents, in the most earnest and solemn manner, make this application to Congress, that a convention immediately be called, of deputies from the several States, with full power to take into their consideration the defects of this constitution that have been suggested by the State Conventions, and report such amendments thereto as they shall find best suited to promote our common interests, and secure to ourselves and our latest posterity the great and unalienable rights of mankind.⁵³

This appears a vibrant declaration, trumpeting the defense of human rights, but must be viewed in proper context, for it was also a virtuous facade behind which Patrick Henry could lurk. Madison and his associates realized that a second convention would unravel all that had been accomplished to that point--achieving the unanimity of the Philadelphia Convention again would be nigh impossible--and thus fought the proposal fervently. Their success in defeating the measure upheld the Constitution in its existing form.⁵⁴

Despite the ulterior motive behind it, the Virginia legislature's message added further weight to the cause of personal liberty with regard to the Constitution. The new Congress would not be able to ignore this, and on the horizon lay the final cornerstone of the land of the free, the Bill of Rights.

THE NEW GOVERNMENT

Madison vs. Henry, Revisited

By defeating Patrick Henry in the Virginia Ratifying Convention, James Madison had accomplished quite a political feat; Henry had long been the prominent leader in Virginia and usually got what he wanted, while Madison was only just reaching his prime. Henry's frustration, however, made him determined to keep Madison out of the new government. Thus as Madison finished his service in the final Continental Congress, Henry spun an effective web for him in Virginia, successfully backing Richard Henry Lee and William Grayson for the two Senate seats and then campaigning James Monroe against Madison for the House of Representatives. Illicit politics, including the spread of false rumors about Madison's distaste for amendments as well as the alteration of political district boundaries ("Henrymandering"), forced Madison (despite a case of hemorrhoids) to return to his native state to stump for votes, a tactic which he abhorred, but which necessity dictated.⁵⁵

Madison and Monroe, though friends, engaged in a rigorous campaign. While admitting, privately, to companions that he did not favor immediate alterations to the Constitution, Madison was quick to realize that public sentiment favored a guarantee of fundamental liberties, and let it be known that he was by no means unfriendly to that cause. Dirty politics were answered with a Madisonian pledge to place Constitutional amendments on the House agenda, and among these a declaration of rights. This assurance was aimed particularly at the Virginia Baptists, Madison's old allies who feared for their religious freedom and rights of

conscience. Promising not to waver, he retained the support of their leader, George Eve, and thereby wrecked the efforts of the local opposition, much to the chagrin of Patrick Henry and his lackeys.⁵⁶

Madison's presence in the key counties throughout the campaign proved pivotal, and he won a convincing victory over Monroe.⁵⁷ Henry's diabolic efforts had not kept Madison from the House of Representatives, and there, of course, a new campaign began--for the Bill of Rights. Political conflict had solidified Madison's stance on amendments, and, together with the philosophic nudgings of Thomas Jefferson, provided the foundation for Madison's endeavors. Our nation, perhaps, owes more to Patrick Henry, inversely, than we realize.

A Bill of Rights?

The crusade for a bill of rights had picked up momentum throughout the state conventions, but while amendments to the Constitution had been a central issue in Virginia, they were somewhat lost in the Congressional shuffle over the formation of the new government. Much had to be done in the initial months, and the Federalists were in no hurry to amend the document they had fought so hard to get ratified, and which had just put them in power.

Debate during this early period centered on the Court system, import duties, and national revenue.⁵⁸ These were critical functions of the new government, and were arguably more pressing than amendments, which could be postponed without serious damage. Madison, however, did not agree. Though he knew the undertaking

would be unpleasant and referred to the "nauseous project of amendments" in a letter to Richard Peters,⁵⁹ he knew the public was eager to obtain a bill of rights, and he was committed to their fight. Writing to George Eve earlier in January, 1789, Madison had summarized his opinions in the following way:

. . .amendments, if pursued with a proper moderation and in a proper mode, will be not only safe, but may serve the double purpose of satisfying the minds of well-meaning opponents, and of providing additional guards in favour of liberty.⁶⁰

Pressing forward with characteristic drive, he would not cease his efforts until twelve Constitutional amendments were submitted to the states five months later in October, 1789.

CONGRESS:THE AMENDMENT STRUGGLE

Mr. Madison's War

Fresh from his tense battle in Virginia, Madison moved to New York and took his seat in the House of Representatives, as the First Congress began building the structure of the new government. On May 4, 1789, keeping his campaign promise, he announced his intention to "bring on the subject of amendments" to the Constitution, three weeks hence.⁶¹ Pressing Congressional matters postponed this until June 8, when Madison quickly moved to form the Committee of the Whole House [COWH] for consideration of his articles. This motion was opposed by members "unfriendly to amendments" on the grounds that it would interrupt other current (and more important) business, mainly concerning federal revenue, and also that Madison was merely trying to garner political points with his constituents. Madison, mildly offended, promptly defended his motivations, and replied that postponement might arouse suspicions among the people, whose widespread sentiment in favor of a declaration of rights was unmistakable. He then listed his proposed amendments for the record. In lieu of the whole House, he proposed a special committee be formed to deal with the amendments; it was finally decided, however, that the COWH would be more proper. This temporarily ended the House discussion.⁶²

Six weeks later, on July 21, Madison again moved for the COWH to consider his amendments, but the fickle House reversed course once more and voted to send them to a special committee, made up of a member from each state (thus, eleven members--North Carolina and Rhode Island were still absent), including Madison. The

Committee of Eleven proved to be only a minor hindrance, and their report, read on July 28, was basically the same as Madison's original proposal. It was temporarily tabled by the House, however.⁶³

Once again urging prompt action, Madison moved on August 3 for consideration by the House to take place on August 12. This measure was approved, though on the 12th the House was too busy to begin a new topic.⁶⁴ [At this point, one pictures an annoyed Virginian, impatiently drumming his fingers, grumbling under his breath, and maligning Patrick Henry's mother.]

THIS HAS
NO PLACE
IN A
SERIOUS
DISCUSSION

Finally, however, the COWH began its discussion of amendments on August 13. The Federalists immediately contended that other affairs should still take priority, and were answered again by Madison's fears of popular dissent; a majority sided with the latter, and the discussion was allowed to continue.⁶⁵

On a different tack, Sherman moved that any amendments should be supplementary, instead of being incorporated into the document, as Madison had planned. Madison's faction stressed the value of continuity in one unified, albeit altered, document, while their opponents spoke of structure, reverence for the original draft, and respect for those who signed it.⁶⁶ According to Roger Sherman:

We ought not to interweave our propositions into the work itself, because it will be destructive of the whole fabric. We might as well endeavor to mix brass, iron, and clay⁶⁷ as to incorporate such heterogeneous articles.

John Vining (Delaware) countered that, with supplementary amendments, "the system would be distorted, and like a careless written letter, have more attached to it in a postscript than was contained in the original composition."⁶⁸ Madison, while asserting

that, "Form, sir, is always of less importance than the substance," declared:

there is a neatness and propriety in incorporating the amendments into the constitution itself; in that case the system will remain uniform and entire; it will certainly be more simple, when the amendments are interwoven into those parts to which they naturally belong, than it will if they consist of separate and distinct parts.⁶⁹

Each argument had merit, and though the measure was temporarily defeated, the effort was renewed later, and ultimately had a profound effect on the nature of the document.

After brief treatment of amendments regarding congressional representation and salaries on August 14, debates began in earnest the following day, when that ever-flammable topic, religion, was addressed. Objectors to the "freedom of religion" clause stated that removing religion from the realm of government might endanger its existence entirely, that "a tendency to abolish religion altogether" might result. Madison replied that the article was conceived to protect the rights of conscience and to guard against the establishment of a national religion. Samuel Livermore (New Hampshire) then moved that the wording be changed to: "Congress shall make no laws touching religion or infringing the rights of conscience," and this was accepted by the House.⁷⁰

The articles protecting speech, assembly, petition, and the press were deliberated next. Theodore Sedgwick (Massachusetts) moved to strike "freedom of assembly" from the provision, feeling that it was "trifling" and "derogatory to the dignity of the House to descend to such minutiae."⁷¹ This motion was voted down, and the remaining articles were approved as reported by the committee. Madison later thwarted the inclusion of several minor articles,

stating that "amendments of a doubtful nature. . .will have a tendency to prejudice the whole system."⁷² This was a continual fear for the Virginian, that irrelevant amendments would weigh down or jeopardize the acceptance of the important ones. Madison recognized this as a shrewd tactic used by his political opponents, as the following assertion to the House reveals:

If I were inclined to make no alteration in the constitution, I would bring forward such amendments as were of a dubious cast, in order to have the whole rejected.⁷³

He succeeded, despite a host of Federalist efforts, in preventing that situation.

On August 17, discussion began on the right to bear arms. Attempts were made to require a 2/3 vote for maintaining a standing army and to strike exemptions for conscientious objectors from the amendment, but both efforts failed, and the clause carried as reported. A provision against the quartering of troops in private homes was quickly accepted (bad memories of 1774 Boston!), and stipulations prohibiting double jeopardy and self-incrimination in criminal cases, as well as guaranteeing due process of law and just compensation, were carried unanimously.⁷⁴

Provisions governing punishments, bails, fines, and illegal searches and seizures were agreed upon, despite several objections that they were indefinite and too strict, including Samuel Livermore's comments that "it is sometimes necessary to hang a man," and that "villains often deserve whipping, and perhaps have their ears cut off."⁷⁵ Fortunately, our penal system is decidedly more civilized than if Mr. Livermore's recommendations had been followed.

Another of Madison's fears, that the enumeration of certain rights might preclude unmentioned ones, was quieted with the quick adoption of what eventually became the Ninth Amendment. Also adopted were guarantees for an impartial jury, and a speedy and public trial in the state where the crime was committed.⁷⁶

Madison's "most valuable amendment in the whole list," concerning the freedoms of speech, conscience, the press, and trial by jury in the states, was approved by the House, though eventually deleted by the Senate.⁷⁷ This final omission thus limited the Bill of Rights to Federal jurisdiction, without affecting the states; Madison was quite displeased with this editing of what he felt was a crucial amendment.

Elbridge Gerry, a stubborn opponent of Madison's endeavors, attempted on the following day to get the COWH to consider all state-proposed amendments, instead of merely those recommended by the Committee of Eleven. This stall tactic, successfully countered by Madison and John Vining, came to nought.⁷⁸ After the House approved measures guaranteeing a jury trial in civil cases and the separation of government powers, Thomas Tucker (South Carolina) continued his state's efforts to subordinate the federal government to the states, moving that federal powers only be those specifically "expressed" in the Constitution. Madison resisted this limitation, stating:

it [is] not possible to confine a government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the constitution descended to recount every minutia.⁷⁹

An interesting statement on implied powers by a future Jeffersonian Republican, this might well have been cited by Alexander Hamilton

in arguments with Madison years later!

Roger Sherman's motion that the amendments be supplementary, proposed for the second time, carried on August 19, despite Madison's continued objections.⁸⁰ This was highly significant, for it altered the fundamental nature of the Bill of Rights, making it a separate, recognizable document, which possessed much more strength than if it had been incorporated into the existing articles of the Constitution.

After minor alterations were made on the 20th, another attempt to limit federal prerogative to "express" powers was made on August 21, this time by Elbridge Gerry.⁸¹ It, too, failed, but the continued effort typifies the pronounced apprehension in the states regarding strong, central power. Representatives were afraid not only of threats to personal liberty, but to the basic sovereignty of the states themselves.

Madison had to again fight the inclusion of relatively minor amendments (dealing with merchant companies, Congressmen accepting foreign titles of nobility, Congressional interference in elections, taxation, etc.), and stated his anxiety that "contentious additions would. . .prostrate the whole project."⁸² His influence prevailed, however, and the project was not prostrated.

The House ended its discussion on August 24, when seventeen amendments were put in proper order and reported by committee to be sent to the Senate.⁸³ Madison had cleared the first Congressional hurdle, but the Senate was another obstacle to overcome on the path to a Bill of Rights.

Senate Pruning

August 25 marked the initial Senate dialogue on the House amendments, and the reception was a familiar one, as Federalist Ralph Izard (South Carolina) moved to postpone their consideration.⁸⁴ While, as in the House, this motion was defeated, it was not without support, and reflected the generally lackadaisical mood in Congress with regard to a Bill of Rights. With a few notable exceptions, public enthusiasm for a declaration of rights far outweighed Congressional sentiments.⁸⁵

Senate accounts from this period are much less detailed than those of the House (the Senate gallery was not open to the public at this time), and therefore our knowledge of the debates is rather limited. Overall, the Senate refrained from adding much new material, merely editing the House amendments, polishing the language, and condensing the articles. While most of the discussion is not on record, certain measures are chronicled. On September 3, for example, the clause guaranteeing the rights of conscience was stricken out (part of a general weakening in the article guarding religious freedom), while the following day the exemption for conscientious objectors was eliminated. The freedoms of speech, assembly, and the press, the right to bear arms, and protections against troop quartering, unlawful searches, and double jeopardy were all eventually approved. Finally, many proposed amendments, including several from Virginia which had not previously been mentioned, were rejected.⁸⁶

Also deleted was the major article guarding against state infringement of personal rights, which, as noted above, was a

crippling blow to Madison, who thinly veiled his disgust in later comments on the Senate's liberal pruning of his work:

The Senate have sent back the plan of amendments with some alterations which strike in my opinion at the most salutary articles. . . the difficulty of uniting the minds of men accustomed to think and act differently can only be conceived by those who have witnessed it.⁸⁷

Obviously frustrated, Madison would have a chance to recover somewhat in the joint Senate/House committee on amendments later that month.

On September 9, the Senate returned twelve substantially pared amendments to the House of Representatives for acceptance, and the ball came back into Madison's court. Though some of the changes were accepted by the House, several discrepancies were unsatisfactory, and, on September 21, a joint committee, headed by Madison, was chosen to mend the rupture. Oliver Ellsworth (Connecticut), Charles Carroll (Maryland), and William Paterson (New Jersey) represented the Senate, while Roger Sherman and John Vining joined Madison from the House. The committee's report, read on the twenty-third, exhibited a Madisonian flavor, reinstating his original freedom of religion clause (much stronger than the Senate version) and adding a few other minor alterations. The next day, the House approved the articles reported by the committee, 37 to 14; on September 25, the Senate voted its concurrence, and twelve amendments, ten of which would become the Bill of Rights, were officially accepted by Congress, to be sent to the States for ratification.⁸⁸

Madison had kept his promise to the people of Virginia, and could be proud of his effort. William Grayson, referring to the amendments in a letter to Patrick Henry, had an altogether

different perspective, as well as a serious case of sour grapes: "They are good for nothing, and I believe, as many others do, that they will do more harm than benefit."⁸⁹

The Twelve Submitted Articles:

ARTICLE I

After the first enumeration, required by the first article of the Constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred; after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred representatives, nor less than one representative for every forty thousand persons, until the number of representatives shall amount to two hundred; after which, the proportion shall be so regulated by Congress, that there shall be no less than two hundred representatives, nor more than one representative for every fifty thousand persons.

ARTICLE II

No law, varying the compensation for the services of the senators and representatives, shall take effect until an election of representatives shall have intervened.

ARTICLE III

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or

abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE IV

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE V

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE VI

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE VII

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject, for the

same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VIII

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defense.

ARTICLE IX

In suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE X

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE XI

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE XII

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATE RATIFICATION OF THE BILL OF RIGHTS

Unfortunately, little was written with regard to the ratification debates in the states, and thus the end of our story is rather anti-climactic. The few available sources are short newspaper references, letters to and from key figures, and the brief, official notifications sent by the states to President George Washington. While these provide a skeletal picture of the course of ratification, they fail to reveal much about the debates themselves. It is difficult, therefore, to contemplate the nature of the arguments, and why, for instance, the first two articles were not approved, or why two states completely rejected the amendments. Explanations can be speculated, but authoritative answers are lost to history.

The newspapers which refer to the amendment ratification process were very limited in their treatment, often merely stating that state conventions were meeting or that several amendments had been passed, without mentioning the course of the debates. Others, such as the Pennsylvania Packet and Daily Advertiser, made brief, general remarks of the amendments' reception in the states:

The amendments to the constitution proposed by Congress to the several states, appear to receive that cordial approbation which does honour to the candour and patriotism of the respective state legislatures, to whom they have been submitted.⁹⁰

The Maryland Journal & Baltimore Advertiser commented enthusiastically on acceptance of the amendments in the following way:

Congress have discovered so tender a regard for the rights of the people, and there has been such a spirit of candour and fairness in all their proceedings, that there is an universal confidence reposed in them by the

wise, judicious and patriotic characters in all the State-Governments; and the honour and dignity of the Union is considered as the glory and happiness of every part of the great Republic, and of every individual citizen.

In general, this is the limit of the existing commentary in the press. Unfortunately, few, if any, specifics are mentioned.

Three states share the dubious legacy of rejecting the Bill of Rights. Two, Georgia and Connecticut, repudiated the amendments unequivocally, or at least this is the direction the few available sources point. Connecticut's House of Representatives approved nine of the twelve amendments, yet then postponed further consideration, and the remaining deliberation, if there was any, has been lost to time. Roger Sherman, the prominent Connecticut Federalist, may have influenced his state's reception of the amendments, but this is pure speculation. No mention or debate on the Bill of Rights in Georgia was recorded, though their failure to ratify is beyond question.

Massachusetts, the third state, has a curious role in this chapter of the Bill of Rights' history. Though its legislature ultimately approved nine of the twelve amendments (all but Articles I, II, & XII), Massachusetts was excluded from the list of states which ratified, due, perhaps, to the evident failure of its legislature to send an official notification to the President. Was this sufficient grounds for exclusion? Perhaps not, but Massachusetts was still one amendment short in any case, and didn't qualify as having ratified the Bill of Rights until formally doing so in 1939, along with Georgia and Connecticut.⁹² It is also possible that, in paying tribute to the Bill of Rights today, we wrongly assume its ratification had the vast significance for our

forefathers that it does for us. Massachusetts' ratification may actually have been of little consequence at the time, however repugnant such an idea appears now. This, again, is open to question.

Explaining the failure of Articles I and II to procure the needed three-fourths vote is a bit easier, though still open to interpretation. Several states ratified them, so they were not complete outcasts, despite their subject matter. Dealing with the rather dry topics of representation ratios and Congressional compensation, they were not kindred to the articles' protecting personal rights and freedoms, and really would not have blended properly into the Bill of Rights. Perhaps this explains their rejection.

Virginia, as to be expected, was a prominent ratification battlefield. Prior to the convention, Senators Richard Henry Lee and William Grayson wrote two letters which set the tone of the campaign, stating their distance from and disgust with the submitted amendments. The opening of the first letter, addressed to Governor Edmund Randolph, goes as follows:

We have long waited in anxious expectations, of having it in our power to transmit effectual Amendments to the Constitution of the United States, and it is with grief that we now send forward propositions inadequate to the purpose of real and substantial Amendments, and so far short of the wishes of our Country.⁹³

The second, addressed to the Speaker of the Virginia House of Representatives, is less fraught with grief, but contains similar remarks:

It is impossible for us not to see the necessary tendency to consolidated empire in the natural operation of the Constitution, if no further amended than as now proposed; and it is equally impossible for us not to be apprehensive for Civil Liberty. . .Such amendments

therefore as may secure against the annihilation of the state governments we devoutly wish to see adopted.⁹⁴

The power of these men and the influence on their partisans assured once again that the battle lines were drawn. Henry Lee, writing to Alexander Hamilton, stated, "The antefederal gentlemen in our assembly do not relish the amendments proposed by Congress to the constitution."⁹⁵ Do tell! It would be two years before passage was won. Patrick Henry was, as always, in the thick of the fray, pushing for postponement and once more seeking an amendment on direct taxation. This latter pursuit was the main source of disagreement in the state, as Hardin Burnley notes in a letter to James Madison:

I believe. . .that the greater part of those who wish either to postpone or reject, are not dissatisfied with the amendments so far as they have gone, but are apprehensive that the adoption of them at this time will be an obstacle to the chief object of their pursuit, the amendment on the subject of direct taxation.⁹⁶

Overcoming this opposition proved a difficult task. Virginia, home of the author of the Bill of Rights, became the last state to ratify it, finally doing so on December 15, 1791.

With the eventual addition of Vermont to the Union on March 4, 1791, eleven states were required for passage of the Constitutional amendments. It was not until December of that year, with Virginia's ratification, that enough states adopted the first ten amendments for them to become official. They ratified in the following order, the dates being those of acceptance by the respective legislatures:

1. New Jersey, November 20, 1789.
2. Maryland, December 19, 1789.
3. North Carolina, December 22, 1789.

4. South Carolina, January 18, 1790.
5. New Hampshire, January 25, 1790.
6. Delaware, February 19, 1790.
7. New York, February 24, 1790.
8. Pennsylvania, March 10, 1790.
9. Rhode Island, June, 1790.
10. Vermont, November 3, 1791.
11. Virginia, December 15, 1791.

Virginia's ratification made the ten amendments--the Bill of Rights--an official addition to the Constitution. Secretary of State Thomas Jefferson, with decidedly less enthusiasm than we might expect, announced the event in an official letter to the state governors dated March 1, 1792, which included the following passage:

...also the ratifications by three fourths of the Legislatures of the Several States, of certain articles in addition and amendment of the Constitution of the United States,⁹⁷ proposed by Congress to the said Legislatures...

With that laconic phrase, one of the world's most recognizable documents officially took its place alongside the Constitution and in the annals of history.

CONCLUSION

Two centuries later, as we look back on the Bill of Rights and its storied ancestry, we owe a debt to the disgruntled English barons in 1215, to the convictions of Sir Edward Coke, to the American patriots for the sacrifices they made during the Revolution, to the Philadelphia Convention of 1787, and to the perseverance of James Madison. It is a document with a long lineage and with many fathers, as befits so important a declaration of personal liberty, with so vital a function: protecting the rights of "We, the People."

PART II

The Eleventh Amendment

- A. Mending Holes in the Articles: Constitutional Intent
- B. The Sovereign States
- C. A Rapid Response: Amendment #11

Mending Holes in the Articles: Constitutional Intent

Like many Constitutional issues, the Eleventh Amendment has roots in the Confederation period. One of the weakest points of the Articles of Confederation was its lack of an unrestricted federal judiciary, which left most cases in the hands of the state courts. In 1783, Alexander Hamilton, a New York delegate to the Confederation Congress, presented a resolution calling for alterations in the Articles. Among several defects, he listed the following:

In want of a Federal Judicature, having cognizance of all matters of general concern in the last resort, especially those in which foreign nations and their subjects are interested; from which defect, by the interference of the local regulations of particular States militating directly or indirectly against the powers vested in the Union, the national treaties will be liable to be infringed, the national faith to be violated, and public tranquillity to be disturbed.⁹⁸

This reflected Hamilton's desire for a strong federal judiciary, which he (and many delegates four years later at Philadelphia) felt was necessary to maintain the traditional "peace and domestic tranquillity." Nothing came of his proposal, but the groundwork was laid for future action, and three years later a Confederation Congress committee reported several amendments, including one establishing a stronger federal court. This, too, came to nought, however, lost in the debate over negotiations with Spain. The next impulse for change resulted in the Philadelphia Constitutional Convention of 1787.⁹⁹

Modifications in the judiciary were widely sanctioned by the majority of delegates to the Federal Convention, who by now

recognized the crippling flaw which Hamilton had noticed in the Articles of Confederation four years earlier. Max Farrand mentions this in his classic, The Framing of the Constitution of the United States:

That there should be a national judiciary was readily accepted by all. Nor was there any controversy over the jurisdiction of such courts as might be established; indeed, the clauses in the original resolution indicating the subjects of jurisdiction were unanimously struck out "in order to leave room for their organization."¹⁰⁰

The problems dealing with state debts inherent in the Confederation were also one of the major causes for concern, particularly to Hamilton. But the intent of the original article covering federal judicial jurisdiction in the Constitution is not totally clear. The wording is ambiguous, and while several explanations of its meaning can be advanced, none are totally convincing. Farrand, in Framing, states "[t]here was no difference of opinion as to the jurisdiction of the national courts," during the Convention, and limits their classification to "all cases arising under the national laws and to such other questions as may involve the national peace and harmony."¹⁰¹ This is vague terminology, to say the least.

Little was mentioned about the sovereignty/jurisdiction clause of Article III once it was reported, though several proposals were dealt with prior to the Committee of Detail's report. These included Edmund Randolph's, probably written by James Madison, which placed "cases in which foreigners, or citizens of other States, applying to such jurisdictions, may be interested" within the federal domain.¹⁰² Alexander Hamilton and William Paterson (New Jersey) also presented proposals,

both providing for a national judiciary with enlarged powers. Neither of these plans, however, would have assigned to the federal courts a jurisdiction as broad as that indicated by the Randolph resolution.¹⁰³

Overall, it is clear that "the nationalists wanted extensive jurisdiction in the federal courts" and "desired a federal judicial power that could reach those matters transcending, in any manner, the interests of individual states vis-a-vis their own citizens."¹⁰⁴ This point holds true for the final, adopted version of Article III, section 1:

The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. To all cases affecting ambassadors, other public ministers and consuls. To all cases of admiralty and maritime jurisdiction. To Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.¹⁰⁵

Important questions which can be posed, therefore, include: Did Article III imply that the states' legal immunity, at least in terms of the federal court, was waived? Was this surrender of state sovereignty intended by the Framers, and was the Constitution ratified with that facet of the judiciary article fully understood?

The Federalists were not united on this front during the ratification debates. Some, such as Edmund Randolph and James Wilson, professed that Article III did imply states were liable to suit in federal court, that since the state governments were deferring their overall sovereignty to the national government, deference to the federal courts logically followed. Others, including Hamilton and Madison, shied away from that

interpretation, and declared that the states retained their immunity, and thus were not suable. Whether this was their true inclination or merely an attempt to calm the fears of the opposition is unclear. Regardless of this fact, the Constitution was ratified, and whatever explanation had been made carried over into the new government.¹⁰⁶

The Sovereign States

Once that government was functioning, this interpretation began to take on greater import. In several instances, states were brought into litigation as defendant instead of as plaintiff, and thus, where the Supreme Court was concerned, a major question of sovereignty lay at hand: was the Federal Court able to render judgement on a state? Did their jurisdiction extend that far? These cases were key precursors of the Eleventh Amendment.

Though a number of litigations, including Vanstophorst v. Maryland and Oswald v. New York, heralded trouble, it was Chisholm v. Georgia, docketed by the U.S. Supreme Court in August, 1792, that really got the fires of dissent blazing in the states. The case concerned Robert Farquhar, a South Carolina merchant, by that time deceased, who had never been paid by the state of Georgia for war supplies delivered in 1777. Georgia rejected the claim for payment, and recommended suit against the commissioners who had been involved. Alexander Chisholm, executor of Farquhar's estate, instead brought suit against the state in U.S. Circuit Court, however, and the ball of discord was rolling. Denying that the federal court had jurisdiction, Georgia asserted its immunity, an

opinion that was later upheld by the circuit court (headed, rather ironically, by Supreme Court Justice James Iredell) itself. Chisholm persisted, and filed an original suit in the Supreme Court of the United States. The stage was set for the Court's first controversial decision--it would lead directly to the Eleventh Amendment.¹⁰⁷

Edmund Randolph, who perceived the significance of the case, was retained as counsel for the plaintiff, thus adding a little more spice to the confrontation. Georgia, however, refused to put in an appearance, prompting an in-depth response by Randolph before the Court. His remarks revolved around the idea that, literally read, the Constitution allowed for suit against a state, and that, by ratifying the document, the states had "made themselves individually subject to restraints," and thus "liable to legal process, with corresponding diminution of their sovereignty." He concluded by stating that "immunizing a state from suit by citizens of other states and by foreigners" would result in the "disruption of domestic tranquility and international peace, the maintenance of which was a primary object of the Constitution."¹⁰⁸

The Supreme Court, consisting of five justices, ruled 4-1 against Georgia. James Iredell, the lone dissenter, maintained that, in his interpretation of the Constitution and Congress' Judiciary Act of 1789, the Court had no jurisdiction in the matter. The remaining four justices (James Wilson, John Blair, William Cushing, and Chief Justice John Jay) disagreed, though, and their sentiments were summarized by Wilson and Jay.¹⁰⁹

Wilson centered his opinion on national supremacy over the states, and added that laws, binding on individuals, may bind men

in the aggregate.¹¹⁰ Finally, he contended that it was inconsistent with the purpose of the Constitution that "any man or body of men--any person natural or artificial--should be permitted to claim, successfully, an entire exemption from the jurisdiction of the national government," and that such jurisdiction was wholly confirmed "by the direct and explicit declaration of the constitution itself."¹¹¹

Jay's opinion largely paralleled these arguments. The Constitution represented an agreement by the people, a compact whereby they transferred their privileges from the state to the federal government. Also, as states could sue individuals, why should they therefore be immune? "True republican government requires that free and equal citizens should have free, fair, and equal justice." Jay concluded by echoing Wilson's belief that the wording, as well as spirit, of the Constitution spoke towards federal jurisdiction in matters such as this.¹¹²

Georgia, it appeared, was out of luck--the Supreme Court of the United States had spoken. The setback was only a temporary one, however.

A Rapid Response: Amendment #11

The Supreme Court's judgement against Georgia came in February, 1793. Strong resentment followed swiftly. Newspapers decried the evils of the vague Constitutional clause, even likening it to a Trojan horse, out of which sinister aristocrats could work the destruction of the states. Georgia responded with a declaratory bill pronouncing the state's sovereignty, as well as

initial rumblings for a Constitutional amendment. Fortunately, this latter cause flourished throughout the nation, for the Georgia legislature was considering the death penalty--by hanging--for federal marshals serving process on the state (file that under Federal jurisdiction)!¹¹³

delete this 5

As mentioned above, the Chisholm decision was only the most climactic of several Supreme Court cases regarding state sovereignty, and, because various states were involved in similar circumstances, support for an amendment dealing with the Supreme Court's jurisdiction spread rapidly. Influential states (including Virginia, Massachusetts, and New York) confronted the federal versus state supremacy question in court; as was often true, Virginia moved decisively, in response both to Chisholm and its own litigation, Grayson (Hollingsworth) v. Virginia:

The Court's decision in Chisholm thoroughly aroused the legislature of Virginia to the impending danger. . . . Late in 1793 the legislature passed two resolutions bearing upon the Chisholm decision and the pending suit against Virginia. The first of these declared that the Court's decision in Chisholm "is incompatible with and dangerous to the sovereignty of the individual states, as the same tends to a general consolidation of these confederated republics." The second instructed the state's senators and requested its representatives to unite with those of other states in obtaining clarifying amendments to the Constitution.¹¹⁴

Massachusetts gave similar instructions. Reaction in Congress was even swifter; the same week of the Chisholm decision, the following amendment was introduced in the U.S. Senate:

The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State,¹¹⁵ or by citizens or subjects of any foreign State.

The Second Congress adjourned before this could be approved, but by the time the Third Congress assembled in December, 1793, opposition to the Chisholm decision had taken firm root nationally. Though there were faint whispers of support for the ruling, almost every state was pressing for revision of the Constitution. In January, 1794, what became the Eleventh Amendment was introduced in the Senate, and passed with only two dissenting votes. The House concurred two months later, 81 to 9. Twelve of fifteen states were then needed for ratification.¹¹⁶

This proved to be a mere formality, as a succession of states, led by New York (which ratified within a month), rapidly voted their approval. By February, 1795, the necessary number of states had ratified, though, interestingly, Pennsylvania and New Jersey (and later Tennessee) refused to. The only obstacle for the amendment was official certification, which dragged on for several years; it was President John Adams, not George Washington, who, in January, 1798, notified Congress of the Eleventh Amendment's official passage.¹¹⁷

Support for the amendment had been widespread, and not just among advocates of states-rights. Many Federalists had backed it, whether due to their own convictions, political necessities, or indifference to its impact. Such patronage for the Eleventh Amendment, at times almost violent in its application, reflected strong feelings about the relationship of the United States and its government. Was this a firm stance on the nature of sovereignty in the new nation or, as they say, just the heat of the moment? It is an interesting question to consider, for the question of

sovereignty would rear its head again in the course of American history.

A few years down the road, Chief Justice John Marshall would reassert the power of the Supreme Court in a different scenario, and he holds a significant place in history for his resolute convictions, which helped create the Supreme Court we know today. The difference a few years can make is indeed striking.

The Eleventh Amendment to the U. S. Constitution:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Epilogue

Prior to the movement of the American capitol to Washington, D.C., in the year 1800, eleven alterations were made to the United States Constitution, in the manner prescribed within its very articles. Its framers, huddled in the Pennsylvania State House amidst the oppressive humidity of a Philadelphia summer, had realized that, though they had expressed basic principles of government and established the outline for the United States of America, only time could judge the success or failure of their efforts, reveal the changes that needed to be made, and shape the true nature of that Constitution. With this in mind, they had allowed for amendments to be brought forth from we, the people, in order to keep perfect that union which had been formed. So, under the banner of liberty and forever seeking out freedom from oppression, Americans ratified the Bill of Rights and the Eleventh Amendment.

This, by itself, represented the passing of a great test; the subject of the amendments, from one perspective, at least, mattered little. The people of a nation, the sons of liberty, had altered and amended their constitution for positive effect. Since that time, amendments have shaped our lives, as we tinker with our founding document and seek to perfect our society. Molded, over time, our Constitution stands now as a world-wide symbol of that same type of liberty and freedom from oppression that our forefathers fought for, and that gave birth to our Bill of Rights. May such motivation forever be our guide.

ENDNOTES

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2. Madison's Notes, p. 69. (Convention date: June 5, 1787)
3. Madison's Notes, p.105. (June 11, 1787)
4. Madison's Notes, p. 347. (July 23, 1787)
5. Madison's Notes, p. 395. From the report of the Committee of Detail, delivered on August 6, 1787.
6. Madison's Notes, p. 609. (September 10, 1787)
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12. Madison's Notes, p. 648. (September 15, 1787)
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16. Miracle, p. 251.
17. The Roots of the Bill of Rights: An Illustrated Source Book of American Freedom, 5 volumes, edited by Bernard Schwartz, (New York: Chelsea House Publishers, 1980), volume 1, pp. 4-7 [Roots henceforth]
18. Roots, v. 1, pp. 17-19.
19. Roots, v. 1, pp. 40-41.
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21. Roots, v. 1, pp. 195-196.

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28. "An Address to a Meeting of the Citizens of Philadelphia," by James Wilson, Roots, v. 3, p. 529.
29. "Brutus," number II, Roots, v. 3, pp. 509-10.
30. "Objections to the Constitution," by James Mason, September, 1787, Roots, v. 2, p. 444.
31. "Answers to Mr. Mason's Objections to the New Constitution," by James Iredell, Roots, v. 2, p. 449.
32. "Observation Leading to a Fair Examination of the System of Government," by Richard Henry Lee, Roots, v. 3, p. 467.
33. "Observations on the New Constitution and the Federal and State Conventions," by Elbridge Gerry, Roots, v. 3, p. 486.
34. Roots, v. 3, pp. 627-28.
35. "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents," December, 1787, Roots, v. 3, p. 668.
36. Roots, v. 3, p. 674.
37. Roots, v. 3, p. 675.
38. Roots, v. 3, p. 676.
39. Roots, v. 4, pp. 729-30.
40. Luther Martin, "A Letter to the Citizens of Maryland," March 20, 1788, cited in Roots, v. 3, p. 496.
41. South Carolina Ratifying Convention, January 16, 1788, Roots, v. 4, p. 745.

42. Roots, v. 4, p. 739.
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44. Virginia Ratifying Convention, June 3, 1788, cited in Irving Brant, James Madison: Father of the Constitution, 1787-1800, (Indianapolis, IN: The Bobbs-Merrill Company, 1950) [Father, henceforth], p. 224.
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50. Roots, v. 4, pp. 932-33.
51. Rutland, Birth, pp. 203, 213, 217.
52. Brant, Father, p. 229.
53. Roots, v. 5, p. 1014.
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57. Brant, Father, pp. 241-42.
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59. Madison to Richard Peters, August 19, 1789, in The Papers of James Madison, edited by Robert A. Rutland, Charles F. Hobson, et al, (Charlottesville, VA: The University Press of Virginia, 1977) [Papers, henceforth], v. 12, p. 346.
60. Madison to George Eve, January 2, 1789, Papers, volume 11, p. 404.
61. Roots, v. 5, p. 1012.
62. Roots, v. 5, pp. 1016-42.
63. Roots, v. 5, pp. 1054-61.
64. Roots, v. 5, p. 1050.

65. Roots, v. 5, pp. 1062-66.
66. Roots, v. 5, pp. 1066-75.
67. Roots, v. 5, p. 1066.
68. Roots, v. 5, p. 1068.
69. Roots, v. 5, p. 1066.
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72. Roots, v. 5, p. 1096.
73. Roots, v. 5, p. 1104.
74. Roots, v. 5, pp. 1107-10.
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83. Rutland, Birth, p. 209.
84. The Diary of William Maclay, ed. by Kenneth Bowling and Helen Veit, (Baltimore: The Johns-Hopkins University Press, 1988), p. 133.
85. Roots, v. 5, p. 1145.
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87. Madison to Edmund Pendleton, September 14, 1789, in Papers, v. 12, p. 402.
88. Roots, v. 5, p. 1159.
89. Grayson to Henry, September 29, 1789, cited in Rutland, Birth, p. 215.

90. December 29, 1789 edition, cited in Roots, v. 5, p. 1180.
91. January 29, 1790 edition, cited in Roots, v. 5, p. 1182.
92. Roots, v. 5, p. 1172.
93. Dated September 28, 1789, and cited in Roots, v. 5, p. 1186.
94. Also dated September 28, 1789, cited in Roots, v. 5, p. 1187.
95. Henry Lee to Alexander Hamilton, November 16, 1789, cited in Roots, v. 5, p. 1186.
96. Burnley to Madison, November 5, 1789, cited in Roots, v. 5, pp. 1184-85.
97. Roots, v. 5, p. 1203.
98. Clyde E. Jacobs, The Eleventh Amendment and Sovereign Immunity. Westport, CT: Greenwood Press, Inc., 1972, p. 10. [Eleventh, henceforth]
99. Jacobs, Eleventh, p. 11.
100. Max Farrand, The Framing of the Constitution of the United States. New Haven, CT: Yale University Press, 1913, p. 79. [Framing, henceforth]
101. Farrand, Framing, p. 119.
102. Madison's Notes, p. 32. (May 29, 1787)
103. Jacobs, Eleventh, pp. 14-15.
104. Jacobs, Eleventh, p. 15.
105. Madison's Notes, p. 624. (September 12, 1787)
106. Jacobs, Eleventh, pp. 39-40. Patrick Henry, for one, was dismayed at Madison's reasoning, and stated that his esteemed colleague was distorting the language.
107. Jacobs, Eleventh, p. 47.
108. Jacobs, Eleventh, p. 49. Randolph was obviously a firm believer in this position, and undoubtedly helped influence the Court's ruling.
109. Jacobs, Eleventh, pp. 50-51.
110. Jacobs, Eleventh, pp. 51-53.

111. Geoffrey Seed, James Wilson: Scottish Intellectual and American Statesman. Millwood, NY: KTO Press, 1978, p. 146. Wilson's opinion in Chisholm v. Georgia is famous for its defense of national sovereignty.

112. Jacobs, Eleventh, pp. 53-55.

113. Page Smith, The Constitution: A Documentary and Narrative History. New York: William Morrow and Co., 1978, pp. 294-99. The Georgia Senate balked at the idea officially, but one would have loved to hear the debate on it!

114. Jacobs, Eleventh, p. 59.

115. Annals of Congress, 2nd Congress, III, pp. 651-52.

116. Jacobs, Eleventh, pp. 65-67.

117. Jacobs, Eleventh, p. 67.

APPENDIX A: The Bill of Rights

Article I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

Article II

A well-regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

Article III

No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Article IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Article VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Article VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX B

The following is a list of complete quotes cited in the preceding report:

>Quotes from Robert Allen Rutland's The Birth of the Bill of Rights:

Thomas Jefferson, writing about the new Constitution to James Madison on December 20, 1787:

Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse, or rest on inference. (Birth, p. 129)

Richard Henry Lee, Senator from Virginia, with regard (and disgust) to waiting on amendments until experience proved their necessity, August 28, 1789:

As if experience were not necessary to prove the propriety of those great principles of Civil liberty which the wisdom of the Ages has found to be necessary barriers against the encroachments of power in the hand of frail Man! (Birth, p. 211)

Lee, who felt that the amendments had already been "mutilated and enfeebled," also states, in a letter to Patrick Henry of September 14, 1789, that

the idea of subsequent amendments, was little better than putting oneself to death first, in expectation that the doctor, who wished our destruction, would afterwards restore us to life.

Lee conceded that some valuable rights were established in the amendments, "but the power to violate them to all intents and purposes remains unchanged." (Birth, p.214)

Thomas Jefferson, in Paris and out of the mainstream of discussion, still had an important opinion on the amendment process. In an August 28, 1789, letter to James Madison, he indicates favor with the proposed Bill of Rights "as far as it goes; but I should have been for going further." To continue in the words of author Robert Allen Rutland,

Jefferson preferred more precise wording in some of the articles. He still opposed the granting of government monopolies and feared a standing army, particularly one composed of foreign mercenaries. These things he would guard against and was confident that they eventually would be prohibited by the Constitution. (Birth, p.213)

Rhode Island, prior to Senate approval of the amendments, was already expressing its favor to Madison's proposals, stating, in the form of a letter from state General Assembly member John Collins to George Washington, that the proposed amendments had "already afforded some relief and satisfaction to the minds of the People of this State," and that they desired soon to join the Union under the Constitution. (Birth, p.213)

>Quotes from The Roots of the Bill of Rights, 5 volumes:

Richard Henry Lee, in an October 9, 1787, invective against the proposed Constitution:

"There are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertained and fixed--a free and enlightened people, in forming this compact, will not resign all their rights to those who govern, and they will fix limits to their legislators and rulers, which will soon be plainly seen by those who are governed, as well as by those who govern: and the latter will know they cannot be passed unperceived by the former, and without giving a general alarm. These rights should be made the basis of every constitution. . ." (p. 467)

James Wilson, in a classic Federalist response, later espoused by Alexander Hamilton in The Federalist, to opposition over the lack of a bill of rights in the Constitution, October, 1787:

". . .it would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should

enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence."
(p.529)

James Wilson, during the Pennsylvania Ratifying Convention, November 28, 1787:

"If the powers of the people rest on the same establishment as is expressed in this Constitution, a bill of rights is by no means a necessary measure.

". . .in a government consisting of enumerated powers, such as is proposed by the United States, a bill of rights would not only be unnecessary, but, in my humble judgement, highly imprudent." (pp. 621-32)

George Mason, writing in a late 1787 pamphlet opposing the proposed Constitution:

"There is no declaration of rights: and the laws of the general government being paramount to the laws and constitutions of the several states, the declaration of rights, in the separate states, are no security." (p.444)

James Iredell, in an early 1788 pamphlet answering Mason's objections (above):

"As to the want of a declaration of rights... in regard to the new Constitution here: the future government which may be formed under that authority certainly cannot act beyond the warrant of that authority." (p.449)

Brutus (pseudonym for a Massachusetts Antifederalist), writing in 1788 about the lack of a bill of rights in the proposed Constitution:

". . .all the powers which the bills of rights guard against the abuse of, are contained or implied in the general ones granted by this Constitution. . .Ought not a government, vested with such extensive and indefinite authority, to have been restricted by declaration of rights? It certainly ought." (pp.509-510)

Elbridge Gerry, attacking the proposed Constitution's lack of a bill of rights, in an early 1788 pamphlet:

"Despotism usually while it is gaining ground, will suffer men to think, say, or write what they please; but when once established, if it is thought necessary to subserve the purposes, of arbitrary power, the most unjust restrictions may take place in the first instance, and an imprimatur on the Press in the next, may silence the complaints, and forbid the most decent remonstrances of an injured and oppressed people." (p.486)

Luther Martin, in an open letter "to the citizens of Maryland," dated March 21, 1788:

"With respect to a bill of rights, had the government been formed upon principles truly federal. . .legislating over and acting upon the states only in their collective or political capacity, and not on individuals, there would have been no need of a bill of rights, as far as related to the rights of individuals, but only as to the rights of states. But the proposed constitution being intended and empowered to act not only on states, but also

immediately on individuals; it renders a recognition and a stipulation in favour of the rights both of states and of men, not only proper, but in my opinion absolutely necessary." (p.496)

George Washington, in an April 28, 1788, letter to the Marquis de Lafayette:

"The opinion of Mr. Jefferson and yourself is certainly a wise one, that the constitution ought by all means to be accepted by nine States before any attempt should be made to procure amendments; for if that acceptance shall not previously take place, men's minds will be so much agitated and soured, that the danger will be greater than ever of our becoming a disunited people. Whereas, on the other hand, with prudence in temper and a spirit of moderation, every essential alteration may in the process of time be expected." (p.987)

Thomas Jefferson, in a December 8, 1788, letter to George Washington:

"I am in hopes that the annexation of a bill of rights to the constitution will alone draw over so great a proportion of the minorities, as to leave little danger in the opposition of the residue; and that this annexation may be made by Congress and the assemblies, without calling a convention which might endanger the most valuable parts of the system." (p.992)

James Madison, in a January 2, 1789, letter to George Eve:

"The Constitution is established on the ratifications of eleven States and a very great majority of the people of America;

and amendments, if pursued with a proper moderation and in a proper mode, will be not only safe, but may serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty." (p.997)

Message from the Virginia Legislature, presented to the House of Representatives, November 14, 1788:

"The cause of amendments we consider as a common cause; and, since concessions have been made from political motives, which, we conceive, may endanger the Republic, we trust that a commendable zeal will be shown for obtaining those provisions, which experience has taught us are necessary to secure from danger the unalienable rights of human nature.

"The anxiety with which our countrymen press for the accomplishment of this important end, will all admit of delay. The slow forms of Congressional discussion and recommendation, if, indeed, they should ever agree to any change, would, we fear, be less certain of success. Happily for their wishes, the Constitution hath presented an alternative, by admitting the submission to a convention of the States. To this, therefore, we resort as the source from whence they are to derive relief from their present apprehensions.

"We do, therefore, in behalf of our constituents, in the most earnest and solemn manner, make this application to Congress, that a convention immediately be called, of deputies from the several States, with full power to take into their consideration the defects of this constitution that have been suggested by the State Conventions, and report such amendments thereto as they shall find

best suited to promote our common interests, and secure to ourselves and our latest posterity the great and unalienable rights of mankind." (p.1014)

Thomas Jefferson, in a March 15, 1789, letter to James Madison, praises a potential bill of rights for "the legal check which it puts into the hands of the judiciary."

James Madison, regarding the consideration of amendments to the Constitution in the House of Representatives, August 13, 1789:

"Is it desirable to keep up a division among the people of the United States on a point in which they consider their most essential rights are concerned?" (p.1063)

James Madison, during the debates on amendments to the Constitution in the House of Representatives, August 15, 1789:

"I appeal to the gentlemen on this floor who are desirous of amending the constitution, whether these proposed are not compatible with what are required by our constituents? Have not the people been told that the rights of conscience, the freedom of speech, the liberty of the press, and trial by jury, were in jeopardy? that they ought not to adopt the constitution until those important rights were secured to them?" (p.1104)

Thomas Tucker (representative from South Carolina), regarding proposed amendments to the Constitution and their relationship to those proposed by the separate states, in the House of Representatives, August 18, 1789:

"States have pretty plainly expressed their apprehensions of the danger to which the rights of their citizens are exposed. Finding these cannot be secured in the mode they had wished, they will naturally recur to the alternative, and endeavor to obtain a federal convention; the consequence of this may be disagreeable to the Union; party spirit may be revived, and animosities rekindled destructive of tranquility." (p.1115)

APPENDIX C

Recorded below are the recommended amendments proposed at the state Constitutional Ratification Conventions, listed chronologically. These lists are fashioned from the in-depth narratives in The Roots of the Bill of Rights, edited by Bernard Schwartz. Only those amendments officially sanctioned have been included, and the majority have been summarized to save space. An asterisk indicates amendments which were ultimately included in the Bill of Rights.

Delaware: None

Pennsylvania:

While not officially recommended, these amendments, proposed by the convention's minority, were quite significant, and are therefore included.

- *1. Protection for the rights of conscience and religious liberty.
- *2. Right to a trial by jury.
- *3. Right to know the nature of charges, confront accusers and witnesses, call evidence, a speedy trial by an impartial local jury, protection against giving evidence against oneself.
- *4. No excessive bail or fines, nor cruel and unusual punishments.
- *5. Requirement of evidence for warrants of search and seizure.
- *6. Freedom of speech, writing, and the press.
- *7. Right to bear arms. No standing armies during peace, and the strict subordination of the military to civil powers.
8. Right of inhabitants to fish and hunt their property without restraint of the government.
9. Congress shall not inhibit the states from taxing, excluding imposts and duties on imports and exports, and shall not levy any taxes itself except duties, imposts, and postage.
10. Annual election of representatives, free elections, state regulation of Congressional elections.
11. State control of the organizing, arming, and disciplining of the militia; limits on Congressional usage of said militia (out of that state) without state consent. The retention of the "sovereignty, freedom, and independency" of the states, as well as all powers not expressly delegated to the United States government.
12. Separation of the legislative, executive, and judicial powers. An advisory council appointed to "advise and assist" the President.
13. No treaties shall be made in opposition to existing laws, state constitutions, or the U.S. Constitution.
14. Confinement of the federal judiciary power to cases either affecting public ministers, involving admiralty and maritime jurisdiction, involving the U.S. as a party, involving controversies between two or more states, or between a state and a citizen of another state or a foreign state.
- *15. The retention by the states of all powers not expressly delegated by the Constitution.

New Jersey: None

Georgia: None

Connecticut: None

Massachusetts:

- *1. The retention by the states of all powers not expressly delegated by the Constitution.
2. A representative ratio of 1:30,000 until the number of representatives reaches two hundred.
3. Limitations on Congress regarding Article 1, section 4 of the Constitution.
4. Limitation of Congressional taxing power.
5. No companies with exclusive advantages of commerce (given by Congress).
- *6. Guarantee of a grand jury in cases with "infamous punishment or loss of life," excepting those which arise in the government and military.
7. Limitations on the Supreme Court, based on financial values involved in the case.
- *8. Right to a trial by jury, if requested, in civil cases between citizens of different states.
9. No foreign titles, offices, or nobility for U.S. officials.

Maryland:

- *1. The retention by the states of all powers not expressly delegated by the Constitution.
- *2. Right to a trial by jury in criminal cases, and protection from double jeopardy.
3. Limitations on the federal judiciary powers.
4. Limitations on judicial jurisdiction.
5. Right to local trial (by jury); additional limitations on jurisdiction.
6. Limitations on judicial jurisdiction.
7. Prohibition of federal judges holding any other office of profit.
- *8. Requirement of evidence for warrants of search and seizure.
9. Limitation of a soldier's enlistment to four years, and only in time of war.
- *10. Prohibition of troop quartering in private houses without consent.
11. "That no mutiny bill continue in force for longer than two years."
- *12. Freedom of the press.
13. "That the militia shall not be subject to martial law, except in time of war, invasion, or rebellion."

South Carolina:

- *1. The retention by the states of all powers not expressly delegated by the Constitution.
2. Limitation of Congressional taxing power.

New Hampshire:

Amendments #1-9 are taken, almost verbatim, from the Massachusetts Convention list.

- *1. The retention by the states of all powers not expressly delegated by the Constitution.
2. A representative ratio of 1:30,000 until the number of representatives reaches two hundred.
3. Limitations on Congress regarding Article 1, section 4 of the Constitution.
4. Limitation of Congressional taxing power.
5. No companies with exclusive advantages of commerce (given by Congress).
- *6. Guarantee of a grand jury in cases with "infamous punishment or loss of life," excepting those which arise in the government and military.
7. Limitations on the Supreme Court, based on financial values involved in the case.
- *8. Right to a trial by jury, if requested, in civil cases between citizens of different states.
9. No foreign titles, offices, or nobility for U.S. officials.
- *10. No standing armies without consent of 3/4 of both houses in Congress, or quartering of troops in private houses without assent.
- *11. Freedom of religion and the rights of conscience.
- *12. Right to bear arms.

Virginia:

Bill of Rights:

1. "That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety."
2. Power resides with the people, and magistrates are agents thereof.
3. Government ought to be instituted for the common benefit of the people.
4. No man is entitled to separate privileges from the community, neither ought offices to be hereditary.
5. Separation of legislative, executive, and judicial powers, with the first two regularly vacated and elected by the people.
6. Elections ought to be free and frequent.
7. All power of suspending laws without consent of the people (or their representatives) ought not to be exercised.
- *8. Right to know the nature of charges, confront accusers and witnesses, call evidence, a speedy trial by an impartial local jury, protection against giving evidence against oneself.
- *9. No imprisonment, seizure, or deprivation of life, liberty, and property but by the law of the land.
10. Right to inquire into the lawfulness and remedy of the loss of a freeman's liberty.
- *11. Trial by jury in civil suits and property controversies.

12. Right to prompt and equal justice.
- *13. No excessive bail or fines, nor cruel and unusual punishments.
- *14. Requirement of evidence for warrants of search and seizure.
- *15. Right of the people to peaceably assemble, and petition for redress of grievances.
- *16. Freedom of speech, and of the press.
- *17. Right to bear arms; the militia is the "proper, natural, and safe" form of defense; standing armies are "dangerous to liberty;" the military ought to be under the strict subordination of the civil government.
- *18. No peacetime troop quartering in private houses without consent, and in war only as the law directs.
19. Allowance of substitution for military service for religious reasons.
- *20. Guarantee of the freedom of religion.

Amendments:

- *1. The retention by the states of all powers not expressly delegated by the Constitution.
2. A representative ratio of 1:30,000 until the number of representatives reaches two hundred.
3. Limitation of Congressional taxing powers.
4. Members of the Senate and House shall not hold any other civil offices.
5. Annual publication of the Senate and House journals, excepting secrete treaties, alliances, and military operations.
6. Annual publication of receipts and expenditures of public money.
7. Commercial treaties require 2/3 concurrence of the Senate; territorial treaties regarding or infringing on state land claims are prohibited, excepting "extreme necessity," and then only with a 3/4 vote of both houses in Congress.
8. Laws regarding navigation or commerce require 2/3 vote of both houses in Congress.
9. No standing armies without 2/3 vote of both houses.
10. No soldier's enlistment shall exceed four years, except in time of war, and then only for the length of said war.
11. State control of the organizing, arming, and disciplining of the militia; the militia not to be subject to martial law, except in time of war, invasion, or rebellion.
12. Congressional power over the "federal town," or other land purchased from the states, shall extend only to the policing and good government thereof.
13. Limitation of the Presidential service to eight years in a period of sixteen years.
14. Limitations on federal judicial jurisdiction.
15. Right, in criminal prosecutions, to challenge the jury.
16. Protection of state elections of senators and representatives.
17. No misinterpretation of Congressional powers.
18. No laws regarding Congressional compensation until the completion of the present Congressional term.

19. "That some tribunal other than the Senate be provided for trying impeachments of senators."
20. Limitations on salary adjustments of federal judges.

New York:

New York also offered a Bill of Rights, very similar to the one put forth by Virginia, but which is not listed here. The only notable difference included was a protection against double jeopardy.

Amendments:

1. A representative ratio of 1:30,000 until the number of representatives reaches two hundred.
2. Limitation on excise taxes.
3. Limitation on Congressional taxing powers.
4. Protection of state elections of senators and representatives.
5. Citizenry qualifications for the offices of President, Vice-President, and members of either house in Congress.
6. No companies with exclusive advantages of commerce (given by Congress).
7. No standing armies without 2/3 vote of both houses.
8. No money be borrowed on the credit of the United States without 2/3 vote of both houses.
9. No declarations of war without 2/3 vote of both houses.
10. Limitations on the suspension of Habeas Corpus.
11. Limitations on legislation regarding citizens of the "federal district" (Washington, D.C.).
12. Limitations on laws regarding federal property in the states (forts, dockyards, etc.).
13. No laws regarding Congressional compensation effective until the completion of the present Congressional term.
14. Annual publication of the Senate and House journals, excepting secrete treaties, alliances, and military operations; both houses' sessions shall be open.
15. No "capitation tax" shall ever be laid by the Congress.
16. Limitations on Senate terms.
17. Members of the Senate and House shall not hold any other civil offices.
18. Senate vacancies to be filled by the state legislature.
19. Limitations on federal bankruptcy laws.
20. Limiting the President to a maximum of two terms.
21. Pardons for treason to be granted by the President only with the consent of Congress.
22. The President shall not command the Army in the field without consent of Congress.
23. Criteria for federal patents, pardons, and writs.
24. Limitations on federal judiciary.
25. Limitations on federal judiciary.
26. Criteria for Supreme Court appeals.
27. Prohibition of federal judges holding any other office of profit.
28. No federal jurisdiction over land controversies, except claims between states, or between individuals and other states.

29. Militia not to serve under federal control for longer than six weeks without state consent.
30. Removal of words "without the Consent of the Congress" from the seventh clause, Article 1, Section 9.
31. Officers of all federal branches of the United States shall be bound by oath to uphold the Constitution and the rights of the states.
32. Criteria for state electors.

North Carolina and Rhode Island did not ratify the Constitution prior to the establishment of the Bill of Rights, though the former state submitted Virginia's proposed amendments as a stipulation for its acceptance.

A Brief Bibliographic Essay

This is by no means meant to be a complete bibliography, which would list every source used in the formulation of this report, but rather a brief description of the key sources utilized. For further references on appropriate topics, readers are pointed to the bibliographies and notes of the works listed below, or to the Office of History at Independence NHP and Chief Historian David C. Dutcher.

The principal basis for the section on the Bill of Rights is an excellent, 5-volume work entitled The Roots of The Bill of Rights: An Illustrated Source Book of American Freedom, edited by Bernard Schwartz (New York: Chelsea House Publishers, 1980). This series, which includes editorial comments prior to each section, does the researcher's dirty work for him, collating the pertinent charters, declarations, newspapers, letters, and speeches in Congress into a cohesive, easy-to-use set of volumes. It covers the entire spectrum of events leading up to the Bill of Rights, from Magna Carta through the ratification of the amendments by the states. Everything which pertains to the Bill of Rights is presented, divided into mainly chronological sections with insightful, brief analyses serving as introductions. This series is an absolute must for anyone doing work on the history of the Bill of Rights.

Other available sources are somewhat limited. For an overview with a similar scope to Part I of this report (though wandering, at times, in other directions), Robert A. Rutland's The Birth of the Bill of Rights (Chapel Hill, N.C.: The University of North Carolina Press, 1955) is satisfactory, though it makes for rather

dry reading at times. Irving Brant's The Bill of Rights: Its Origin and Meaning (New York: The Bobbs-Merrill Company, 1965) is a fine book, but deals more with the modern implications of the Bill of Rights than with its history and establishment. It has a few brief chapters on the latter themes. Any biographies of James Madison will, by necessity, deal with the Bill of Rights, though treatment will vary with the quality of the book itself. Irving Brant's James Madison: Father of the Constitution (New York: The Bobbs-Merrill Company, 1950), one of a series on Madison by Brant, is quite good, and sheds light on Madison's ideas and attitudes as well as providing the political context of his work. Madison's papers provide first-hand accounts of his amendment fight; of particular value are his letters to and from Thomas Jefferson, as well as those to and from friends during his campaign for a Virginia Congressional seat. The Roots volumes provide most of these pertinent letters, though often only in fragmentary form.

Finally, there are the "Annals of Congress" and the exhaustive Documentary History of the First Federal Congress, 1789-1791 (Baltimore: The Johns Hopkins University Press, 1977), edited by Linda Grant De Pauw, et al, which list the Congressional debates in toto and spread the entire course of discussion out on the table for the reader to see. Such sources are, of course, invaluable.

Regarding the Eleventh Amendment, the key source utilized was Clyde E. Jacobs' The Eleventh Amendment and Sovereign Immunity (Westport, CT: Greenwood Press, 1972), which, though dealing specifically with the chosen topic, is written by a Political Scientist, and therefore is about as thrilling to read as a chemistry book. Buried under the excessive verbiage in the first

few chapters is the full background of the amendment, including an in-depth look at the "who" and "why" sides of the subject. Read my report instead, though--it will leave a better taste in your mouth. !

Several Constitutional histories provide brief discussions on the 11th Amendment, but I won't mention any specifically. Again, as noted above, certain biographies and papers of key figures add to the story, while Madison's Notes shows the Convention aspect and the "Annals of Congress" give the Congressional account. Records of the specific court cases, Chisholm v. Georgia in particular, will provide the gory details. !